IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3391 OF 2007

1. Mr.Pradeep Sadashiv Pavgi
2. Mrs.Sucheta W/o. Pradeep Pavgi
3. Ms.Devika d/o. Pradeep Pavgi
   Petitioner No.3 being minor
   through guardian father i.e.
   Petitioner No.1 Mr.Pradeep S. Pavgi,
   All R/o. Sukrut, Cap. Vaidya Nagar,
   Nashik-Pune Road, Nashik.
   All petitioner Nos.1 to 3 members
   of Hindu Undivided Family, which
   is carrying on business in the name
   of "Structures Steel." ...Petitioners

Vs.

1.R.S.Luth Education Trust
2.Dreams Constructions
3.Mr.Ratan Luth ..Respondents.

Mr.A.A.Kumbhakoni i/b T.D.Deshmukh, advs. for the Petitioner.

Mr.M.M.Sathaye, adv. for the Respondent No.1.

Mr.R.A.Thorat, adv. for the Respondent No.2.

CORAM : J.H.BHATIA, J.
DATE : OCTOBER 12, 2007.

ORAL JUDGMENT:

1. **Rule.**

2. Rule made returnable forthwith. With consent of the learned counsel for the Parties, matter is taken up for final hearing.

3. To state in brief, the petitioner filed summary suit no.33 of 2006 against the respondents for recovery of certain amount. According to the petitioner, the respondent no.1 is a education trust of which the respondent no.3 is a chairman and the respondent no.2 is a partnership firm of which the respondent no.3 is a partner. The respondent nos.1 and 2 are under the control and management of the Respondent No.3. All activities including financial activities of the respondent nos.1 and 2 are exclusively run and conducted by the respondent no.3. For raising constructions of a huge project at village: Dugaon, Taluka and District: Nashik for the purpose of school and educational academy, Respondent No.3 for the Respondent No.1 approached the Petitioner for purchase of steel. Petitioner according supplied the steel at the site of the defendants from November, 2004 to March, 2005. It was agreed between the parties that bill raised by the petitioner has to be cleared and paid within thirty days and in case of delay in payment by the respondents, delay charges of Rs.500/- per tonne per month would be paid by the respondents. Total supplies under 55 different bills were worth Rs.1,96,10,431/-. Debit notes were also issued for delay payment for an amount of Rs.15,76,645/-. The respondents made payment of Rs.1,48,64,483.00 by

different cheques towards price of steel. The respondent no.2 issued a cheque no.167547 dated 25.4.2005 for amount of Rs.48,01,029.00 drawn against Punjab National Bank branch towards the payment dues on account of supply of steel. Cheque was signed by the respondent no.3 as a partner of the respondent no.2 and the respondent no.1 confirmed, by the letter dated 2.5.2005, also issued under the signature of the respondent no.3, that the said cheque was issued for the payment due for the supply of steel at their Dugaon site. Initially, the respondent no.1 had some doubts about the delay payment charges but after some correspondence, the respondent no.1 confirmed that rate of delay payment charges should be at the rate of Rs.500/- per ton for delay of every thirty days. By letter dated 2.5.2005, the respondent no.1 informed the petitioner that the date when the cheque may be presented for the encashment would be informed on 4th May, 2005 latest by 2.30 p.m. By letter dated 4-5-2005, the respondent no.1 requested the petitioner to deposit the said cheque with bank for payment. According to the petitioner, the cheque was presented but was dishonoured. Thereafter, again it was presented on 25.10.2005 but again it was dishonoured for want of sufficient funds. On 23.11.2005 petitioner issued notice to the respondents in this respect and the said notice was replied on behalf of all the

respondents but as the respondents failed to make the payment, Summary Suit No.33 of 2006 was filed, which is based on the said cheque, written contract, orders and correspondence and bills in writing.

4. In response to the notice, the respondent no.2 appeared and made an application seeking leave to defend the suit contending that the defendant/respondent no.2 had no privity of contract as far as the contract for supply of steel is concerned and it would not be liable to pay the amount to the petitioner. Defendants/respondent nos.1 and 3 also moved an application seeking leave to defend the suit. According to them, the suit is based on the cheque, which was allegedly issued by the respondent no.2 and, therefore, they have been unnecessarily impleaded in the suit. Besides this, the respondents have contended that the suit is not tenable as summary suit. It was also contended that the petitioner claims to be Hindu Undivided Family but it has not disclosed the names of members of Hindu Undivided Family and on that ground also, the suit is liable to be dismissed.

5. The learned trial Court after hearing the parties granted unconditional leave to the respondents holding that there is a triable issue particularly because the cheque was issued by the respondent no.2,

which is a partnership firm and not by the respondent no.1, who had purchased the material.

6. Being aggrieved by the unconditional leave, the petitioner has preferred the present petition. According to the petitioner, there is no bonafide defence available to the respondents and the learned trial Court wrongly came to conclusion that there is triable issue. It is contended that in any case, it is not a fit case to grant unconditional leave to defend particularly because the contract is based on written contract and there is admission of the dues for which the cheque was issued and which was dishonoured. It is contended that the there is a shadow boxing between the respondent no.1 and 3 on one hand and the respondent no.2 on the other hand while in fact, the respondent nos.1 and 2 both are controlled by the respondent no.3. He had placed the order, taken supplies and issued the cheques in the name of the partnership firm.

7. Heard the learned counsel for the Parties.

8. First of all, it is contended by the learned counsel for the respondents that against the impugned order, revision application would lie under Section 115 of the C.P.C. and, therefore, when the efficacious remedy is available, writ petition is not tenable.

Mr.Kumbhakoni the learned counsel for the petitioner/plaintiff has rightly pointed out that in view of the proviso added to Section 115(1) of the C.P.C. by the Code of Civil Procedure (Amendment) Act, 1999, revision is not tenable because even if the conditional order would have been passed by the trial Court, the suit would not have been finally disposed off. Section 115(1) of the C.P.C. reads as follows:

> **115. Revision.-(1)** The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-
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> (a) to have exercised a jurisdiction not vested in it by law, or
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> (b) to have failed to exercise a jurisdiction so vested, or
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> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

From the proviso, it is clear that the High Court shall not in exercise of revisional jurisdiction vary or reverse any order made or any order deciding an issue

in the course of suit or other proceeding except where the order if it had been made in favour of the party applying for the revision, would have finally disposed of the suit or other proceedings. In view of this, if the leave would have been refused, the plaintiff would be entitled to a judgment but if the conditional leave would have been granted, the suit or the proceeding would not come to an end. Even though the petitioner prayed for setting aside the impugned order, the petitioner took following two grounds (H) and (I) in paragraph 17 of the petition.

> "H. That the defence taken by Respondents is nothing but illusory, sham or practically moonshine. The defence is not honest and bonafide. Hence, no leave, much less unconditional leave ought to have been granted to Respondents for defending the suit filed by Petitioner.
>
> I. That the learned Trial Court patently erred in law by granting unconditional leave for Respondents to defend the suit filed by Petitioner, more particularly when the claim of Petitioner is time and again admitted by Respondents.

At the outset, Mr.Kumbhakoni the learned counsel for the petitioner made it clear that the petitioner is not pressing for rejection of prayer for leave to defend and the only objection of the petitioner/appellant is that unconditional leave should not have been granted in view of admissions recorded in the documents that

the cheque amount was payable as a due from the respondents to the petitioner. He contended that he would press only ground (I) referred above. In view of this, it is clear that even if the trial Court would have granted conditional leave, the suit would proceed subject to compliance of the conditions but it was not likely to come to an end. The suit will also not come to an end if the order passed by the trial Court is modified granting conditional leave in stead of unconditional leave. In these circumstances, I find no substance in the contention of the learned counsel for the respondents that the petition is not tenable.

9. It was further contended by the learned counsel for the respondents that the suit was filed by Hindu Undivided Family without disclosing the names of all the members of the Hindu Undivided Family and, therefore, suit is not tenable. However, this defect has been rectified by making appropriate amendment in the title of the plaint as well as in the title of this petition.

10. After going through record, it becomes clear that the respondent no.3 is the Chairman of respondent no.1 and also the partner of respondent no.2. It appears that he has been controlling both these

concerns and the respondent nos.1 to 3 have been acting in concert. It may be noted that by letter dated 2-5-2005 issued by the respondent no.1 under the signature of the respondent no.3, it is specifically mentioned "We have issued two cheques from our company-Dream Constructions, amounting to Rs.96,65,348.00 vide cheque nos.167537 dated 17.03.2005 amounting to Rs.48,64,319.00 and 167547 dated 25.04.2005 amounting to Rs.48,01,029.00 respectively, drawn on Punjab National Bank, Sharanpur Road Branch, against the payment due for the supply of steel at our Dugoan site." This text included cheque no.167547 dated 25.04.2005 amounting to Rs.48,01,029.00 on which the suit is based. It may also be noted that in response to notice issued by the petitioner to the respondents, notice-reply dated 7-12-2005 was sent by Reena Kothari advocate on behalf of all the respondents and in paragraph 7 of the said reply, it was stated "My Clients used to purchase Steel from you, as per their requirement." Nowhere it was mentioned that purchase was made only by the respondent no.1 or the respondent no.3 and not by the respondent no.2. In view of this material on record, the contention of the respondents that any of them had no concern with this transaction or with a cheque can not be accepted atleast at this stage.

11. It was further contended that the summary suit is not tenable on the basis of cheque because it is not a bill of exchange. This contention has also no basis in view of Section 6 of the Negotiable Instruments Act, which reads as follows:

> "6. "Cheque"- A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form."

Thus, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and, therefore, contention that a cheque is not a bill of exchange has no basis. The learned counsel for the respondents placed reliance upon **Jyotsna K. Valia v. T.S.Parekh and Company 2007(4) Maharashtra Law Journal 517** authority of full bench of this Court in respect of the contention that summary suit is not tenable on the basis of cheque. In fact, I do not find any such observation in the said judgment. In paragraph 26, full bench of this Court observed as follows:

> "It is true that a cheque is a bill of exchange, a special type of bill of exchange which is drawn on a bank. However, a suit upon a cheque (bill of exchange) means a suit to recover money due on a cheque (bill of exchange) drawn by the

defendant, which is dishonoured."

> In such a case, the suit must be for recovery of money on a cheque drawn in favour of or endorsed to the plaintiff. A suit, however for recovery of a loan which was advanced by the plaintiff by a cheque is not a suit upon a cheque or a bill of exchange and as such is not maintainable as a summary suit."

Infact, these observations only indicate that the suit can not be based on the honoured cheque, which means that if the payment is made by the party by cheque and that cheque has been honoured, summary suit is not tenable on the basis of that cheque. However, summary suit is tenable on the basis of the cheque issued by the defendant for the payment of debt if the cheque is dishonoured.

12. Order XXXVII Rule 1 Sub-rule (2) of the Code of Civil Procedure makes it clear that summary suit can be filed on the basis of (a) bills of exchange, hundies and promissory Notes; (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising,-(i) on a written contract; etc. In the present case, suit is based not only on the cheque, which is a bill of exchange, but also on the written contract. There is sufficient record to show that the contract about supply of steel was entered into in

writing in form of a number of letters exchanged between the parties, settling the terms of the contract.

13. The learned counsel for the respondents also placed reliance upon the observations made by the Supreme Court in **M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation AIR 1977 Supreme Court 577** wherein Their Lordships laid down the principles, which should be taken into consideration while granting leave to defend summary suit. Their Lordships observed as follows in paragraph 8:

> "8. In Sm. Kiranmoyee Dassi v. Dr.J.Chatterjee, (1945) 49 Cal WN 246 AT p.253, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, C.P.C. in the form of the following propositions (at p.253):
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> "(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
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> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
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> (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not

> positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.
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> (d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
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> (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgement, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence."

14. Taking into consideration the facts of the present case, I find that defence raised by the defendants/respondents is only illusory, sham or practically moonshine and particularly so in respect of the cheque amount. In such circumstances, in my opinion, leave could be granted only subject to certain conditions. In my opinion out of the total claim amounting to Rs.63,22,593/-, in respect of the amount of cheque i.e. Rs.48,01,029/- there is no defence at all and therefore to protect the interest of the plaintiff, it will be necessary to direct the

defendants/respondents to deposit the said amount of Rs.48,01,029/- as a condition to leave to defend the suit.

15. In view of the facts and circumstances and the legal position discussed above, I find that the order passed by the trial Court granting unconditional leave needs to be suitably amended and it stands amended as follows:

i. Subject to depositing an amount of Rs.48,01,029/- by the defendants with the trial Court within six weeks from this day, leave to defend the Summary Suit No.33 of 2006 is hereby granted. If the amount is deposited, the plaintiff shall be at liberty to move the trial Court for withdrawal of the said amount subject to his undertaking to bring back the amount, if finally it is found that the plaintiff is not entitled to a decree. In case, the plaintiffs are required to bring back the amount, the same shall carry interest at the rate not less than 12% per annum. In case, the defendants fail to deposit the amount within the stipulated period, the plaintiffs shall be entitled to a judgment ignoring the written statements, which might have been filed by the defendants pending this petition. If the defendants deposit amount, they shall be at liberty to make appropriate amendment in the

written statement, which they claim to have already filed.

16. Rule made absolute accordingly.

[J.H.BHATIA, J.]